State Corporation Commission's logic it would entitled to treat those profits as if they had been earned through telephone service.

The Constitution does not tolerate such fictions. In Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396, 399 (1920) (Holmes, J.), for example, the Supreme Court held that a State could not consider the profits earned by an affiliated sawmill and lumber business in regulating a railroad's operation. In Chesapeake & Potomac Tel. & Tel. Co. v. Manning, 186 U.S. 238 (1902), the Court held that Congress could not impute the earnings of a private communications system operated by a regulated telephone company in the District of Columbia, to regulated operations for the purpose of reducing rates for regulated service:

> It appears that some portion of the defendant's business is of a purely private nature . . . and as to such business Congress could not, if it would, prescribe what would be charged therefor. So, in an inquiry into the reasonableness of the charges imposed by Congress, it is essential that the receipts and expenses from such private telephone systems be excluded from consideration.

Id. at 249 (emphasis added).

Similarly, in Northern P. R. Co. v. North Dakota ex rel. McCue, 236 U.S. 585 (1915), the Supreme Court rejected the suggestion that a railroad's freight rates could be calculated by profits earned by passenger traffic. When "the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account," "the presumption of reasonableness is rebutted," and the regulation is invalid. Id. at 599. Otherwise, the state could "set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate." Id. Accordingly, the Court concluded:

> The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority.

Id. at 604.[14]

This principle is particularly salient in light of the emergence of competition in both Yellow Pages and local telephone markets. The Telecommunications Act of 1996 preempts any state or local law that prohibits or has the effect of prohibiting entry into local telephone markets. 47 U.S.C. § 253(a). The 1996 Act also imposes affirmative obligations on incumbent local telephone companies in order to assist other telecommunications carriers in competing against incumbent providers. These affirmative obligations include requirements that incumbents sell elements and features of their networks at regulated prices and furnish some of such elements and features at no charge. See 47 U.S.C. §§ 251(b), (c), 259(a). The Federal Communications Commission has explained that, "[r]ather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition." Implementation of the Local Competition Provisions of the

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[14] See also Norfolk & Western Ry. Co. v. Conley, 236 U.S. 605, 609 (1915) ("the state may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal"); Chicago and North Western Transp. Co. v. United States, 678 F.2d 665, 668 (7th Cir. 1982) (Posner, now C.J.) (reaffirming Brooks-Scanlon and explaining that "[t]he government may not force a railroad to operate a line at a loss"); El Paso Elec. Co. v. Federal Energy Regulatory Comm'n, 667 F.2d 462, 468 (5th Cir. 1982) ("with respect to ratemaking, each jurisdiction or class of customers should pay its own way.").

Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (released Aug. 8, 1996) ("Local Competition Order") ¶ 1.

The emergence of competition highlights the constitutional problems with imputation. The FCC has explained that "[i]t is widely recognized that, because a competitive market drives prices to cost, a system of charges which includes non-cost based components is inherently unstable and unsustainable." Local Competition Order ¶ 8. "Where competition prevails, a firm cannot compensate itself for losses on one venture by raising prices on other lines of business; if it tried to do so, competitors could profitably capture the business." Associated Gas Distributors v. FERC, 824 F.2d 981, 1034 (D.C. Cir. 1987).

Accordingly, imputing Yellow Pages revenue to regulated telephone service violates the Fifth and Fourteenth Amendment.

CONCLUSION

For all these reasons, plaintiffs' motion for summary judgment should be granted.

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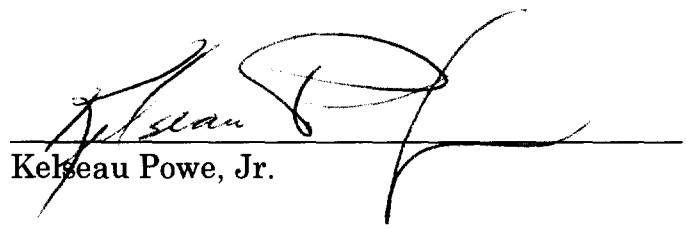
I, Kelseau Powe, Jr., do hereby certify that on this 10th day of January, 1997, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC. TO RECOMMENDED DECISION** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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